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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 826

THE GREAT WESTERN FOOD DISTRIBUTORS, INC., NATHANIEL E. HESS AND CHARLES S. BORDEN,
Petitioners,

vs.

EZRA TAFT BENSON (SUCCESSOR TO CHARLES F. BRANNAN), SECRETARY OF AGRICULTURE, AND THOMAS J. FLAVIN, JUDICIAL OFFICER BY APPOINTMENT OF THE SECRETARY OF AGRICULTURE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DONNELLEY-GARRETT PRINTING COMPANY, CHICAGO

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered January 14, 1953.

OPINIONS BELOW.

The judgment of the Court of Appeals denied a petition filed by the petitioners to review and set aside an order of June 20, 1951, issued by the Secretary of Agriculture under Section 6b of the Commodity Exchange Act (7 U. S. C. A.,

sec. 9). The order appears in the record at pages 1407-1456. The opinion of the Court of Appeals appears in the record at page 1469 and is reported in 201 Fed. 2d 476.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 14, 1953 (R. 1481). Petition for rehearing filed January 29, 1953 (R. 1482) was denied February 24, 1953 (R. 1483). The jurisdiction of this court is invoked under 28 U. S. C. A., sec. 1254(1).

QUESTIONS.

1. The case involves a determination of the elements constituting a "corner" of a "commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade," under Section 9 of the Commodity Exchange Act (7 U. S. C. A., sec. 13), which does not specifically define the phrase:

   a. The court stated that "we find what we consider fatal deficiencies in the government's theory," in that "this finding that the prices of refrigerator eggs and their futures were abnormally high in view of the supply and demand situation cannot be said to be sustained by the weight of the evidence." It being conceded by the Government that an abnormal price imposed by a cornerer is an essential element of a corner under the Commodity Exchange Act, and the court having found that the Government failed to sustain its charge that prices were abnormally high in view of the existing supply and demand situation, may prices be considered abnormal merely because certain price relationships differed from the average of other years, during which prices and market conditions varied substantially?

   b. In determining whether a person cornered a commodity in interstate commerce or for future delivery

on a board of trade (Chicago Mercantile Exchange) under the Commodity Exchange Act, is it proper to exclude the entire available supply of the commodity located outside the city of Chicago where the board of trade was located, it appearing,

(i) that the rules of the board of trade permit delivery of the commodity whether such commodity is located in Chicago or elsewhere in the United States,

(ii) that the board of trade is national in scope and is the only important board in the United States for trading of such commodity, that traders located throughout the United States trade on the board, and that the commodity stored throughout the United States is hedged on the board,

(iii) that the rules as to delivery were filed pursuant to statute with the Secretary of Agriculture who voiced no objection thereto, and

(iv) that trading is conducted in reliance upon such rules of the board of trade, and, customarily, the open futures commitment greatly exceeds the amount of the commodity stored in Chicago?

c. Even if it be assumed that only the commodity stored in Chicago constitutes the deliverable supply, can a person be said to have cornered the market merely because some of the shorts would have to purchase from such person, where at all times a majority of the shorts, ranging from 52% to 98%, could have liquidated their position without recourse to such person?

d. Can a corner exist in the absence of withholding of the commodity by the alleged cornerer from the market, the court having made no finding of any withholding?

2. The Commodity Exchange Act differs from the Administrative Procedure Act in providing that the findings of the Secretary of Agriculture must be "supported by the weight of the evidence." The question is whether the court

is required to weigh the evidence to determine where the "weight of the evidence" lies, or whether the court was correct in stating that its function was not to reweigh the evidence to ascertain in which direction it preponderates, but "rather to review the record with the purpose of determining whether the finder of fact was justified, *i. e.*, acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings."

STATEMENT.

The Secretary of Agriculture issued a complaint under Section 6b of the Commodity Exchange Act against The Great Western Food Distributors, Inc. and its officers charging that during December 1947, they attempted to manipulate the price of eggs in interstate commerce and for future delivery on the Chicago Mercantile Exchange and attempted to corner and did corner such eggs (R. 2). Answers were filed denying the charges (R. 11-17). After a hearing before a referee, the judicial officer appointed by the Secretary of Agriculture entered an order on June 20, 1951, directing that Great Western, Nathaniel Hess, its president, and Charles S. Borden, manager of the Chicago office, be denied all trading privileges on all contract markets for a period of one year (R. 1456). The Court of Appeals sustained the decision of the judicial officer that Great Western cornered the egg market in December 1947, and denied the petition to set aside the order.

The Chicago Mercantile Exchange is a contract market under the provisions of the Commodity Exchange Act, and functions as a board of trade for the purchase and sale of eggs and other commodities for immediate and future delivery. It is national in scope, and is the only important

market in the United States for trading in egg futures. National factors are always reflected on the Exchange. Traders throughout the United States trade on the Exchange, and eggs stored all over the country are hedged on the Exchange. During 1947, egg futures contracts equivalent to more than half the nation's egg crop were traded on the Exchange (R. 29, 446, 467, 481, 492, 505, 512, 734; Res. Ex. 4, R. 1268; Res. Ex. 43, R. 1332).

A "futures contract" is one for the sale and delivery of a commodity in a specified month, and is identified by the name of the month in which delivery is to be made. Thus, a contract for the delivery of eggs in the month of December is referred to as a December future. The buyer under a futures contract is referred to as a "long" and the seller as a "short" (R. 30-31). The "short" has the option to deliver at any time during the month specified in the futures contract, and the "long" is obligated to accept delivery when tendered (R. 38, 136). Most contracts, however, are not liquidated by delivery of the commodity, but by offsetting futures purchases or sales on the Exchange (R. 32-33). The term "open commitment" refers to the total number of futures contracts on the Exchange which have not yet been completed by offset or delivery (R. 31-32).

The trading unit was a lot (in trade parlance a "car") of 600 cases of eggs, 30 dozen to the case (R. 35; R. 1105-1106, Rules 1403, 1405e). Futures trading in the December 1947 futures ended December 23 (R. 45).

Under the rules of the Chicago Mercantile Exchange, delivery on futures contracts could be made as follows: (1) Refrigerator (storage) eggs in approved warehouses in Chicago could be delivered at any time during the delivery month. (2) Refrigerator eggs in approved warehouses outside Chicago could be delivered with an allowance of ¾ of

a cent per dozen plus actual freight from point of storage to Chicago, to be made not later than 9:00 A. M., December 22. (3) Fresh eggs on track or in approved warehouses in Chicago were deliverable at any time during the delivery month (R. 40-41, 44-46; R. 1107, Rules 1405f and h).

Out-of-town eggs need not be brought to Chicago. Delivery is effected merely by transfer of the warehouse receipt (R. 1104, Rule 1004; R. 38-39).

Pursuant to statute, the rules of the Exchange had been filed with the Secretary of Agriculture (R. 443, 449).

The Government contends that Great Western maintained a corner from December 3 to December 23, 1947 (Gov't Brief in C. A., p. 33, and table, p. 8). To support its contention, the Government argued and the court agreed that notwithstanding the rules of the Chicago Mercantile Exchange, only Chicago storage eggs can be considered to be the available supply for delivery on futures contracts.

Petitioner, Great Western, dealt in both egg futures and actual eggs (generally referred to as "cash eggs"). It commenced the month of November 1947, with an inventory of 87 cars, and sold a total of 83 cars during that month (R. 1242-1243, Gov. Ex. 37; R. 1336, Res. Ex. 48). On December 3, Great Western replenished its inventory by the purchase of 71 cars, with a resultant inventory of 81 cars. This was in conformity with the November sales and with its current requirements, since at that time its sales of cash eggs were approximately 25 cars weekly. In the latter half of December, Great Western received delivery of 53 cars on its futures contracts, so that it ended the month of December with 82 cars (R. 1125, Gov. Ex. 9; R. 1137, Gov. Ex. 16; R. 1243-1245, Gov. Ex. 37).

The uncontradicted evidence, by respondents' own witness, is that Great Western's inventory could not be considered much of an inventory (R. 201).

Eggs start going into storage in February, and the peak is reached in July and August. Then the eggs start going out of storage, and the supply is completely exhausted by the end of January. December, accordingly, is near the tail end of the storage season; and on December 31, 1947, the storage stocks were only 4% of the August 1 supply (R. 186, 199; R. 1268, Res. Ex. 4; R. 1267, Res. Ex. 3). Furthermore, the December 1947 storage stocks were the smallest on record except for one year (R. 1330, Res. Ex. 41; R. 684). On the other hand, the production of fresh eggs in December 1947 was greater than any prior year except one, being 10,363,000 cases, equivalent to 17,271 cars, of which almost two-thirds is produced in the Middle West (R. 1261, Gov. Ex. 51; R. 666-667, 800, 930).

Great Western started trading in December 1947 futures on October 29, 1947 and developed a long position in that future, reaching its largest position of 292 cars on December 2, 1947. At that time, the open commitment was 740 cars, so that Great Western's holdings were 39% of the open commitment (R. 1117). Thereafter Great Western's position decreased. At the same time, Great Western traded in January 1948 futures, wherein it maintained a short position substantially equal to or greater than its December 1947 long position (R. 1117, Gov. Ex. 4; R. 1331, Res. Ex. 42). The purchase of the futures of one month and the sale of a like number of futures of a succeeding month constitute a "spreading" transaction, a well recognized method of trading which performs an important economic function. 7 U. S. C. A., Sec. 6a(1); Federal Trade Commission, *Report on Grain Trade*, Vol. 7, pp. 77, 80. Of the 292 cars of futures on December 2, Great Western received delivery of only 53 cars. The rest were offset (R. 1123, Gov. Ex. 7).

The Court of Appeals found that the Government failed

to prove that prices were abnormal in relation to the supply and demand conditions then existing (R. 1477). Trading in December futures opened on September 2, 1947, and the price was 53.50 cents per dozen on that day. Thereafter prices fluctuated from day to day, with a high of 57.60; and on December 1, it was again 53.50 cents. On December 3, the day the alleged corner began, it was 53.60 cents. The prices then fluctuated from day to day as they did prior to December, with a high of 56.25 cents, and a low of 50.50 cents, and ending at 53.50 cents on December 23 (R. 76; R. 1100, Gov. Ex. 1; R. 1308, Res. Ex. 30).

Great Western filed daily reports of its futures trading with the Commodity Exchange Authority so that the Government always had full knowledge of Great Western's futures position and receipt of deliveries on its futures (R. 53-54, 72-73, 131-132, 151-152, 156, 642-645; R. 1271, Res. Ex. 6; R. 1290, 1292, Res. Ex. 11, 15). Two observers of the Commodity Exchange Authority in daily attendance on the floor of the Chicago Mercantile Exchange reported no unusual occurrences in the way of trading practices, price movement, slowness in reduction of open contracts, or any other thing worthy of note (R. 54, 59, 222, 144). Great Western's cash eggs were offered for sale at all times during December; there were sales of 61 cars of cash eggs, and Great Western's holdings were known in the trade (R. 193-194, 468, 640; R. 1125, Gov. Ex. 9; R. 1164, 1189, 1190, 1192, 1194, 1196). There is no charge of conspiracy, deceit, trickery, concealment, false rumors or other form of fraud. See *General Foods Corp.* v. *Brannan,* 170 F. (2d) 220, 224.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals is the first and only decision upholding the existence of a corner under section 9 of the Commodity Exchange Act (7 U. S. C. A., sec. 13). It affects trading on every board of trade in the commodities of wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Irish potatoes, and wool tops (7 U. S. C. A., sec. 2), which constitute a large portion of the agricultural commodities of the nation.

In concluding that a corner existed, the opinion of the court disregards the language of the Commodity Exchange Act, section 9, and is inconsistent with the definition of a corner accepted by this Court in *U. S.* v. *Patten,* 226 U. S. 525, 539-540, and by the recognized authorities.

The opinion of the Court of Appeals is also inconsistent with basic principles relating to corner and manipulation cases established by a different panel of the court in *General Foods Corp.* v. *Brannan,* 170 F. 2d 220.

The great importance of the issues in this case in the administration of the Commodity Exchange Act has been admitted by the Government in oral argument before the Court of Appeals. The issues are also of great importance to all boards of trade and traders throughout the country. To what extent may they rely upon the rules of a board of trade duly adopted and filed with the Secretary of Agriculture without objection? When does trading run afoul of the Commodity Exchange Act? Are prices to be deemed abnormal even though they are not abnormal in view of the supply and demand situation? The importance of the issues require an authoritative construction of Section 9 of the Commodity Exchange Act by the highest court.

I.

The Court of Appeals said that "we find what we consider *fatal* deficiencies in the Government's theory," because the finding of the judicial officer "that the prices of refrigerator eggs and their futures were abnormally high in view of the supply and demand situation cannot be said to be sustained by the weight of the evidence." (Wherever emphasis appears in quoted material, such emphasis is supplied.)

This fatal deficiency in the Government's case required the Court of Appeals to set aside the order of the judicial officer. An abnormal price is an essential element of a corner. *United States* v. *Patten*, 226 U. S. 525, 539-540; *General Foods Corp.* v. *Brannan*, 170 F. (2d) 220, 230; *Secretary of Agriculture* v. *General Foods Corp.*, C. E. A. Doc. No. 34.

The Government conceded in its brief (p. 82) before the Court of Appeals "that the Government must prove manipulation as an essential element of a corner," and further conceded that "in order to prove manipulation in this case, it is only necessary to prove that Great Western caused the price of refrigerator eggs in Chicago or December futures to be higher than they would have been if only the forces of supply and demand were operative." The Government's expert witness, Dr. Beach, stated in defining a corner, that an abnormal price means that it is "not one determined by competitive supply and demand conditions" (R. 359).

Although the Court of Appeals found that the Government failed to prove that prices were abnormally high in view of the supply and demand situation, a failure which the Court said was a fatal deficiency, the Court resurrected the dead with the conclusion that prices were abnor-

mal because certain price relationships differed from the average of other years.

The first relationship was the spread or difference between December 1947 and January 1948 futures. The Court of Appeals stated that from 1932 to 1948, December prices averaged 103.3% of January prices, and that in 1947, this ratio was 112.4% (R. 1478). The court overlooked the fact that the average of prior years conceals a range from approximately 98% to 117.9% and that the percentages varied from year to year (R. 1309, Res. Ex. 30; R. 1258, Gov. Ex. 48). Each year is governed by the supply-demand situation of that year, and the prices during December 1947 were governed by the supply-demand situation then existing, and not that of other years.

The second relationship declared to be abnormal was that the price of December 1947 futures was abnormally high in relation to the price of fresh eggs at the close of trading (R. 1479). The fresh egg price was 0.5 cents over December 1947 futures price, compared to an average of 4 cents during 1932-1947. Here again the average conceals the range from 1.85 cents to 7 cents, and the further fact that in 3 years (1932, 1941, 1949) the futures prices even exceeded the fresh egg prices (R. 1236, Gov. Ex. 32; R. 1337, Res. Ex. 49). In January 1948, which involved the same storage season, the fresh egg price was 0.65 cents over the futures price, just about the same as in December 1947 (R. 1253, Gov. Ex. 43).

The court also held that during 14 years a precipitous drop in fresh egg prices was reflected by a drop in futures prices in all instances except six. Since the year 1947 failed to conform to the pattern during 8 years, although it conformed to the pattern during 6 years, the court concludes the situation was abnormal. By the same reason-

ing the relationsip during each of the 6 years would also be abnormal.

The evidence is uncontradicted that price relationships depend on the current market situation, and that no two years are alike (R. 709, 499). Since prices, price ratios and market factors vary radically from year to year, no sound or reliable deduction can be drawn from a mere comparison with prior years (R. 681). As the judicial officer stated in another connection (R. 1445):

> "Moreover the price ratios for other years vary radically, and no sound or reliable deductions as to the appropriate level for December futures prices can be drawn from this type of evidence."

The Court of Appeals found that the Government failed to prove that prices were abnormally high in view of the supply and demand situation in December 1947. Certainly, prices cannot be declared abnormal for failure to conform with price ratios of other years, which reflect the supply and demand situations prevailing in those respective years.

In our petition for rehearing we pointed out that the price relationships during the war and post-war years differed from those of prior years, and more closely resembled those of 1947, and that was another reason why comparison with prior years was unwarranted (Petn., pp. 7-11). The price data for the later years was not in evidence because the hearing was concluded prior thereto, but reference was made to accepted market reports. Respondents answered that the prices in these later years were also abnormal because of activities of the same nature as the activities of the petitioners in this case (Reply, p. 9). It is improbable that the market would be in a continual state of "corner", and respondent's answer merely emphasizes the importance of a review by this Court.

II.

The Court of Appeals has overlooked the basic features of a corner in other respects.

A. In the administrative hearing, the Government defined a corner under the Commodity Exchange Act as "the purchase and holding of a large and controlling long position in a future, *together with the acquisition and withholding from sale of all or a dominant portion of the deliverable cash supply,* for the purpose of manipulating the price" (Gov. Br., p. 32). This definition is substantially correct, and is supported by the authorities. In its brief to the Court of Appeals, however, the Government receded from this position and for the first time contended that a corner may exist whether or not the cornerer acquires or withholds any of the cash commodity from sale (Br., pp. 13, 52-53, 75). The Court of Appeals agreed with the Government's revised contention.

Respondents are charged with violation of Section 9 of the Commodity Exchange Act, which reads:

> "Any person who shall * * * manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any board of trade, or who shall corner or attempt to corner *any such commodity,* * * * shall be deemed guilty of a misdemeanor" etc. (Emphasis added.)

Accordingly, the Act forbids the corner of (a) any commodity in interstate commerce, and (b) any commodity for future delivery on or subject to the rules of any board of trade. We fail to understand how one may corner a commodity without acquiring such commodity.

That the control of a commodity is a basic element of a corner is recognized in the authoritative definitions ac-

cepted by the judicial officer and all parties. The definition in *U. S.* v. *Patten*, 226 U. S. 525, 539-540, includes "control of all or the dominant portion of a commodity." The definition of S. S. Huebner in the *Encyclopedia of Social Sciences* includes "possession of all or substantially all of a given commodity * * * available for delivery upon the outstanding contracts of short sellers" (R. 1448).

B. As these definitions indicate, a corner involves the control of all or the dominant portion of a commodity. In supporting the Government's contention that a corner existed, the court upheld the Government's assertion that only storage eggs in Chicago warehouses are to be considered part of the deliverable supply, and that all storage eggs outside Chicago and all fresh eggs are to be excluded. It is evident that petitioners cannot be accused of cornering eggs in interstate commerce unless all the eggs in interstate commerce are considered. The Government accordingly concentrates on the charge that petitioners cornered eggs "for future delivery on or subject to the rules of any board of trade."

The question then arises—what eggs are available for future delivery? The rules of the Chicago Mercantile Exchange provide that Chicago storage eggs, out-of-town storage eggs and fresh eggs are deliverable upon futures contracts. We pointed out that the Chicago Mercantile Exchange is a national market and is the only egg futures market of any importance, and that eggs stored all over the country are hedged on this market. Pursuant to the statute, the rules of the Exchange were filed with the Secretary of Agriculture who presented no objections thereto. The Commodity Exchange Act requires all Exchanges to adopt rules "for the prevention of manipulation of prices and the cornering of any commodity", and provides for the suspension or revocation of a license of any Exchange

which fails to comply with the requirement" (7 U. S. C. A., sec. 7(d) and 8).

Trading on the Exchange is influenced by the fact that out-of-town storage eggs and fresh eggs may be delivered on futures contracts; and accordingly the open futures commitment is generally greatly in excess of the storage eggs in Chicago (R. 478, 487, 503, 512, 187, 239, 177-8, 198).

The weakness of respondent's position, adopted by the court, is demonstrated by a simple illustration. If the owner of ten cars of eggs in Milwaukee sells ten cars short on the Exchange for December delivery, and if Great Western bought these ten contracts, then in accordance with the court's decision, Great Western should be charged with ten longs in determining the size of Great Western's futures position, but the ten cars of Milwaukee eggs are not part of the deliverable supply even though they are deliverable under the rules of the Exchange. Repeat this illustration manyfold and the inequity of the court's ruling becomes oppressive.

Great Western did not own any of the out-of-town eggs, and these eggs could have been procured for delivery on futures contracts, if the shorts so desired, in a free competitive market. The Government charges it would have been more costly to deliver out-of-town eggs. There is no proof whatever in the record as to the prices of out-of-town eggs, except for one reference that fresh eggs were being offered out of Kansas for Chicago delivery at 2¢ under the Chicago price (R. 1189). Whether the cost of delivering out-of-town eggs was greater or less than that of eggs in Chicago is not the question. It is not the purpose of the Commodity Exchange Act to assure that all shorts may acquire their eggs at the same uniform price, or to guarantee that the shorts shall trade at a profit. The law seeks merely to prevent manipulated prices. So long

as out-of-town eggs are readily available at normal competitive prices, such eggs are part of the deliverable supply. The same reasoning applies to fresh eggs.

The court sustained the Government's contention that out-of-town eggs should not be considered because they are not delivered as frequently as Chicago eggs. That fact does not eliminate out-of-town eggs as part of the deliverable supply. More than 95% of futures contracts are liquidated by offset and not by delivery; and it may be argued with the same illogic that all eggs should be eliminated because deliveries are not as frequent as offsets. Out-of-town storage eggs were delivered in substantial quantities in the prior year 1946, and out-of-town eggs were also delivered in October, 1947 as well as December, 1947 (R. 1269, Res. Ex. 5A).

The Act prohibits a corner of any commodity "for future delivery on or subject to the rules of any board of trade". The deliverable commodity is determined by the rules of the board of trade filed with the Secretary of Agriculture. The Government and the court have simply disregarded the rules.

The holding of the Court of Appeals is contrary to the decision in *General Foods Corp.* v. *Brannan*, 170 F. 2d 220, which was rendered by a different panel of judges of the same court. In that case respondent was charged with cornering the Chicago rye market. The court, in reversing the finding of the judicial officer that there had been an attempt to corner the market, stated that the rye in other cities must also be considered, and that there was no proof that respondent controlled or attempted to control any of the rye in these cities (p. 228). The same view is expressed by G. W. Hoffman, consulting economist to the U. S. Department of Agriculture, in his book *Futures Trading upon Organized Commodity Markets* (1932), page 307.

III.

The withholding of the cash commodity from sale by the alleged cornerer is an essential element of a corner. By gaining control of all or substantially all of the deliverable supplies and then withholding such supplies from sale, the cornerer renders it impossible for the shorts to obtain supplies to fulfill their contracts. This court stated in *U. S.* v. *Patten,* 226 U. S. 525, 540, that an essential element of a corner is "a withholding from sale, without which, it is conceded by both parties, the market could not be cornered."

Though petitioners vigorously urged that the record fails to show any withholding from sale, the Court of Appeals is silent on the question, and upheld the existence of a corner even though it did not find a withholding from sale.

IV.

After the court ruled that only Chicago storage eggs could be considered the available supply, the court then held that Great Western potentionally controlled the market, because with the elimination of the out-of-town supplies and fresh eggs, a number of shorts would have been compelled to go to Great Western to liquidate their contracts. As previously stated, a short may liquidate his contract by offset or delivery. Accordingly, his recourse is to the longs in the futures market, plus the cash supply. At all times during the period in question, even on the assumption that only Chicago storage may be considered, a majority of the short contracts could have been liquidated without recourse to Great Western. On December 3rd when Great Western held its largest position, 98% of the short contracts could have been liquidated without recourse to Great Western. A week later, on December 10,

the percentage was 79%. A week later on December 17, the percentage was 66%. On the last day of the alleged corner, December 23, the percentage was 66% (R. 1239, Gov. Ex. 35).

This is not the control of "all" or "substantially all" or the "dominant portion" which the authorities include as an essential element of a corner. Furthermore, during this period Great Western did not increase its holdings after December 3, but on the contrary reduced them. Apparently a trader is to be free from the charge of cornering the market only if he has a commodity which no one else needs, but if he has merchandise that some one else needs, even though a majority can satisfy their needs elsewhere, he is to be charged with cornering the market.

With the inclusion of storage eggs outside Chicago as part of the deliverable supply, all short contracts could have been liquidated without recourse to Great Western (R. 1267, Res. Ex. 3; R. 1239, Gov. Ex. 35). The same was true if fresh eggs were included.

The Court of Appeals referred to the fact that Great Western's percentage of holdings increased. As we shall show, this increase was not due to any increase in Great Western's holdings, but to the fact that the reduction in Great Western's holdings was not as rapid as the aggregate reduction of all other traders. Of course, Great Western was not bound to liquidate in proportion to the liquidation of the rest of the market, and had a right to trade in accordance with its own judgment and estimate of the market. The judicial officer in the *General Foods* case, CEA Docket 34, stated that "the holding of a large supply of rye by General Foods was not in itself prohibited, nor was its failure to liquidate the stock or part of it in such way as to make rye available to elevators or other speculative interests." This position was upheld by the court in the *General Foods* case, 170 F. 2d 220, 231.

On December 3, Great Western's inventory of cash eggs was 81 cars, which was only 29% of the storage eggs in Chicago warehouses, only 12% of the storage eggs in ten lead. g markets, and an even smaller percentage of the storage eggs in the United States. Thereafter during the period of the alleged corner, Great Western's inventory declined as sales were made. The increase in percentage after December 3 was not due to increased inventory, because Great Western's inventory actually decreased. On December 17, it was down to 49 cars. Thereafter there was some increase because some of the shorts made deliveries on their contracts. On December 23, when the Government concedes the alleged corner ended, Great Western's inventory was 65 cars, which was 56.0% of Chicago storage stocks and 28% of the storage stocks in the ten markets. The percentage increased only because the overall storage supplies were decreasing and some of the shorts made deliveries to Great Western on their futures contracts. Furthermore, these percentages relate to the storage supply at the tail end of the season, and in a year in which the storage stocks were the smallest on record except for one year. When the supply of fresh eggs is considered, Great Western's holdings were only a minute fraction of 1% (R. 1125, Gov. Ex. 9; R. 1130-1132, Gov. Ex. 13; R. 1267, Res. Ex. 3).

Likewise the increasing percentage in the futures holdings was not due to any increase in Great Western's holdings. When Great Western reached its highest point of 292 cars on December 2, it was 39% of the open commitment. When its position was reduced to 25 cars on December 23, that represented 96% of an open commitment of 26 (R. 1117, Gov. Ex. 4; R. 1331, Res. Ex. 42).

Under the Commodity Exchange Act, authority is vested in Government to place limits upon trading (7 U. S. C. A., par. 6a), but this authority had not been exercised; and

petitioners are not charged with violating any trading limits.

In the *General Foods* case, 170 F. 2d 220, the court noted that the Government offered no proof "that any short in the Chicago rye market during the relevant period was in need of actual rye for delivery or other purposes or was pressured, coerced or injured by any action taken or contemplated by any of the petitioners." The same failure of proof exists in this case. The Government did not produce any evidence that any shorts desiring eggs for delivery were unable to obtain same. The Government did not produce any shorts who were pressured, coerced or injured by any action taken by the petitioners.

In the *General Foods* case, the court stressed the point that the Government's case was weakened in that no evidence of any attempt to manipulate the market was discernible by the Government's own experienced observers while the trading activities were in progress. The same situation existed in the instant case, but was completely ignored by the court.

V.

The standard of review under the Commodity Exchange Act differs from that under other Acts. Whereas under the Administrative Procedure Act the court is directed to set aside an administrative order if "unsupported by substantial evidence" (5 U. S. C. A., Par. 1009(e)), the Commodity Exchange Act requires that the findings of the Secretary of Agriculture be "supported by the weight of evidence" (7 U. S. C. A., sec. 9).

In *General Foods Corporation* v. *Brannan*, 170 F. 2d 220, 223-4 (C. A. 7), the court held that "the standard to be employed is something other than the 'substantial evidence rule' controlling in the review of other administrative orders," and "that petitioners are entitled to have the order

vacated unless this court concludes that it is sustained by the weight of the evidence, and to us that means the preponderance or greater weight."

In the instant case, the court held contrary to the ruling in the *General Foods* case and stated "that the function of this court is something other than mechanically reweighing evidence to ascertain in which direction it preponderates," but rather to determine whether the finder of the fact "acted reasonably in concluding that the evidence * * * supported his findings." The cases cited by the court in support of its interpretation arose under National Labor Relations Act which is similar in language to the Administrative Procedure Act and differs from the Commodity Exchange Act.

The court also accepted certain findings of the referee on conflicting evidence as if such findings were conclusive because the examiner heard and saw the witnesses. The rationale of its argument is contrary to the conclusion of this court in *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U. S. 474, 496, wherein it was held:

> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve."

If review is granted, we propose to discuss the evidence to show that the evidence fails to support certain findings of the referee.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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